

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF MISSISSIPPI  
GREENVILLE DIVISION**

**FRANK SIVORI**

**PLAINTIFF**

**v.**

**No. 4:10CV8-P-A**

**EMMITT SPARKMAN, ET AL.**

**DEFENDANTS**

**REPORT AND RECOMMENDATION**

On May 11, 2010, plaintiff Frank Sivori, an inmate in the custody of the Mississippi State Penitentiary with inmate number 35659, appeared for a hearing as set forth in *Spears v. McCotter*, 766 F.2d 179 (5<sup>th</sup> Cir. 1985), to determine whether there exists a justiciable basis for his claim filed under 42 U.S.C. § 1983. A plaintiff's claim will be dismissed if "it lacks an arguable basis in law or fact, such as when a prisoner alleges the violation of a legal interest that does not exist." *Martin v. Scott*, 156 F.3d 578 (5<sup>th</sup> Cir. 1998)(citations omitted). The Prison Litigation Reform Act applies to this case because the plaintiff was incarcerated when he filed this lawsuit.<sup>1</sup>

**The Plaintiff's Claims**

The plaintiff claims that: (1) the defendants violated his right to due process by changing his custody classification from B-Custody to the more restrictive C-custody without a hearing, which resulted in his transfer to Unit 32 at the Mississippi State Penitentiary; (2) the defendants have denied Sivori access to the courts by sporadically providing legal services he has requested, including cases, statutes and postage for legal mail; (3) the defendants have periodically denied the plaintiff, who has hepatitis C, proper medical care by failing to provide an "acute hep." diet;

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<sup>1</sup>28 U.S.C. § 1915(g).

and (4) the defendants have violated his right to free exercise of his religion<sup>2</sup> by denying his requests for Kosher meals – and by confiscating a “kippah” sent to him in the mail.<sup>3</sup>

### **Defendants Voluntarily Dismissed**

The plaintiff voluntarily dismissed the following defendants during the *Spears* hearing: Darlester Foster, Brenda Gibson, Connie Pierce Smith, and Officer Collins. All of the plaintiff’s claims against these defendants will be dismissed.

### **Denial of Access to the Courts**

Sivori argues that David Petrie (with the Inmate Legal Assistance Program) and Karen Cummins interfered with his access to the courts by only sporadically providing legal services he has requested, including cases, statutes and postage for legal mail. Under the Supreme Court’s decision in *Bounds v. Smith*, 430 U.S. 817, 821 (1977), prisoners possess a constitutional right of access to courts, including having the “ability . . . to prepare and transmit a necessary legal document to court.” *Eason v. Thaler*, 73 F.3d 1322, 1328 (5<sup>th</sup> Cir. 1996) (quoting *Brewer v. Wilkinson*, 3 F.3d 816, 821 (5<sup>th</sup> Cir. 1993), *cert. denied*, 510 U.S. 1123 (1994)). The right of access to the courts is limited to allow prisoners opportunity to file nonfrivolous claims challenging their convictions or conditions of confinement. *Jones v. Greninger*, 188 F.3d 322, 325 (5<sup>th</sup> Cir. 1999). “Interference with a prisoner’s right to access to the courts, such as delay, may result in a constitutional deprivation.” *Chriceol v. Phillips*, 169 F.3d 313, 317 (5<sup>th</sup> Cir. 1999) (citations omitted). However, “[a] denial-of-access-to-the-courts claim is not valid if a litigant’s position is not prejudiced by the alleged violation.” *Ruiz v. United States*, 160 F.3d

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<sup>2</sup>The plaintiff is a member of the “house of Yahweh.”

<sup>3</sup>A “kippah” is a thin, rounded skullcap – also called a yarmulke.

273, 275 (5<sup>th</sup> Cir. 1998); *Henthorn v. Swinson*, 955 F.2d 351, 354 (5<sup>th</sup> Cir. 1992), *cert. denied*, 504 U.S. 988 (1992) (citing *Richardson v. McDonnell*, 841 F.2d 120, 122 (5<sup>th</sup> Cir. 1988)). It is only when a prisoner suffers some sort of actual prejudice or detriment because of the alleged denial of access to the courts that the allegation becomes one of a constitutional nature. *Walker v. Navarro County Jail*, 4 F.3d 410, 413 (5<sup>th</sup> Cir. 1993); *see Howland v. Kilquist*, 833 F.2d 639, 642 (7<sup>th</sup> Cir. 1987). A plaintiff must show real detriment, *i.e.*, true denial of access, such as the loss of a motion, the loss of a right to commence, prosecute or appeal in a court, or substantial delay in obtaining a judicial determination in a proceeding. *Oaks v. Wainwright*, 430 F.2d 241 (5<sup>th</sup> Cir. 1970). As Sivori has not alleged that his legal position has been compromised in any case, his claims against David Petrie and Karen Cummins for denial of access to the courts should be dismissed for failure to state a constitutional claim.

**Claims Against Deputy Warden Emmitt L. Sparkman  
and Superintendent Lawrence Kelly**

Sivori claims that he sent “informal letters” to defendants Sparkman and Kelly regarding the various claims set forth in his complaint. Sivori complains that these defendants, rather than investigating and resolving the issues set forth in his letters, treated the letters as formal grievances and forwarded them to the Administrative Remedy Program for resolution. This allegation fails to state a proper claim for relief under 42 U.S.C. § 1983. The Superintendent of the Mississippi State Penitentiary is charged with the safety, security, and orderly administration of the largest penal facility in the state, and the Deputy Warden assists the Superintendent with the discharge of that responsibility. The men holding these positions cannot personally respond to the individual grievances of each one of the thousands of inmates within the Mississippi State Penitentiary. This court, with the cooperation of the Mississippi Department of Corrections,

created the Administrative Remedy Program to provide for the orderly handling of the many grievances throughout the penal system in the State of Mississippi. Defendants Kelly and Sparkman referred Sivori's letters to the Administrative Remedy Program for resolution. This decision was both appropriate and within the bound of the Constitution. As such, the plaintiff's claims against defendants Kelly and Sparkman should be dismissed for failure to state a claim upon which relief could be granted.

### **Due Process Claim Against Case Manager Janice Guest**

Sivori claims that at a classification hearing held on April 9, 2009, defendant Janice Guest reduced his custody classification from B to C – and that Sivori was not present at the hearing. This allegation also fails to state a claim upon which relief could be granted. Inmates have neither a protectable property or liberty interest to any particular housing assignment or custodial classification, either under the United States Constitution or under Mississippi law. *Hewitt v. Helms*, 450 U.S. 460, 468 (1983); *Meachum v. Fano*, 427 U.S. 215, 224 (1976); *Neals v. Norwood*, 59 F.3d 530, 533 (5<sup>th</sup> Cir. 1995); *Wilson v. Budney*, 976 F.2d 957, 958 (5<sup>th</sup> Cir. 1992); *McCord v. Maggio*, 910 F.2d 1248, 1250 (5<sup>th</sup> Cir. 1990) (citations omitted); Miss. Code Ann. §§ 47-5-99 to -103 (1993). Prisoner classification is a matter squarely within the “broad discretion” of prison officials, “free from judicial intervention” except in extreme circumstances. *McCord*, 910 F.2d at 1250 (citations omitted). Sivori has not alleged any extreme circumstances regarding his classification; as such, his claim regarding reclassification without a hearing should be dismissed for failure to state a claim upon which relief could be granted.

### **Claims Which Should Proceed**

The plaintiff's claims against Pamela Lee, the Food Service Supervisor, the Dietician, Captain Morris, Lieutenant Jones, Lieutenant King for failure to provide either a Kosher diet or a diet for acute hepatitis will proceed.<sup>4</sup> Further, the plaintiff's claims against Dr. Johnson for discontinuing Sivori's diet to treat hepatitis C will proceed. Likewise, the plaintiff's claims against Warden Davenport for retaliating against Sivori for filing grievances about receiving inappropriate diet trays will proceed. Finally, the plaintiff's claims against members of the Postal Inspection Department for blocking the plaintiff's attempt to receive a kippah to worship in accordance with the House of Yahweh will proceed, as well.

### **Handling of Objections, Acknowledgment of Receipt**

The appropriate procedures for filing objections to these findings and recommendations are found in 28 U.S.C. § 636(b)(1)(B) and Fed. R. Civ. P. 72(b). Objections must be in writing and must be filed within fourteen (14) days of this date, and "a party's failure to file written objections to the findings, conclusions, and recommendation in a magistrate judge's report and recommendation within [14] days after being served with a copy shall bar that party, except on grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court . . . ." *Douglass v. United Services Automobile Ass'n*, 79 F.3d 1415, 1428-29 (5<sup>th</sup> Cir. 1996) (*en banc*) (citations omitted); *see also United States v. Carrillo-Morales*, 27 F.3d 1054, 1061-62 (5<sup>th</sup> Cir. 1994), *cert. denied*, 513 U.S. 1178, 115 S.Ct. 1163, 130 L. Ed. 1119 (1995).

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<sup>4</sup>It is unclear whether the Kosher diet and the acute hepatitis C diet are compatible. Should the diets be incompatible, Sivori testified that he would prefer the Kosher diet.

The plaintiff must acknowledge receipt of this report and recommendation by signing the enclosed acknowledgment form and returning it to the clerk of the court within fourteen (14) days of this date. *Failure to comply with the requirements of this paragraph may lead to dismissal of this lawsuit under Fed. R. Civ. P. 41(b) for failure to prosecute the claim and for failure to comply with an order of the court.*

Respectfully submitted this 13<sup>th</sup> day of May, 2010.

/s/ S. Allan Alexander  
UNITED STATES MAGISTRATE JUDGE